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September 7, 1993

**HAND DELIVER**

William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

ATTN: The Review Board

RE: Calvary Educational Broadcasting Network, Inc., MM Docket  
No. 92-122, Poplar Bluff, Missouri

Dear Ms. Searcy:

Transmitted herewith on Behalf of Calvary Educational Broadcasting Network, Inc. is an original and eleven copies of its "Reply Brief" submitted in connection with the above-referenced docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

**MAY & DUNNE, CHARTERED**

By: 

Joseph E. Dunne III  
Attorney for Calvary Educational  
Broadcasting Network, Inc.

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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In Re Application of ) MM Docket No. 92-122  
 )  
CALVARY EDUCATIONAL BROADCASTING ) File No. BRH-891103UA  
NETWORK, INC. )  
 )  
For Renewal of License of )  
KOKS(FM), Poplar Bluff, Missouri )

TO: The Review Board

**REPLY BRIEF**

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September 7, 1993

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### SUMMARY

In filing its Exceptions the Mass Media Bureau ignores the fact that the Chief Administrative Law Judge made a number of credibility findings based on witness testimony that should be accorded great deference on review. In each instance the Presiding Officer's findings are supported by substantial and credible record evidence.

In addition, the Mass Media Bureau's arguments that the licensee should be disqualified for failure to comply with the FM blanketing rules ignores the record evidence that the station was functioning under a misconception of its obligations under the rules with respect to TV channel 6, a misconception that the Commission did not disabuse the licensee of until the Hearing Designation Order. The Presiding Officer compelling record evidence that the licensee's previous failures to comply with the rules were compromised, in part, by inexperience, ignorance, and extraordinarily difficult technical problem about which it knew nothing, and a deluge of petition complaints which inevitably diminished Calvary's capacity to respond.

Similarly, the Mass Media Bureau's other contentions concerning Calvary's alleged "misrepresentations" and/or lack of candor founder on the fact that Calvary did accurately report that Mrs. Wynn, Gray and Durbin were not satisfied with Calvary's response, or that Calvary had not cured the interference to channel 6. Differences between the complainants' versions of facts and those apparent to Calvary were properly attributed to subjective

perceptions concerning television coverage, rather than an intent to deceive the Commission.

Likewise, Calvary did not misrepresent facts when it represented that the Smith's were "uncooperative," given the fact that Mrs. Smith had expressed her opposition to a tower in the neighborhood, had canvassed the neighbors, and then all of Butler county to collect a deluge of petition complaints against Calvary, had refused Calvary access to her roof to install a filter, and filed a lawsuit against Calvary requesting unspecified money damages. Mrs. Smith clearly was an interested and biased party, and was accurately characterized by Calvary as "uncooperative."

Finally, there is not enough unambiguous and blatant evidence to allow the Commission to conclude that Mr. Stewart had committed knowing and calculated perjury in contradicting Mr. Meador's testimony concerning the alleged overpower operation. Not only is Mr. Stewart's testimony supported by Mrs. Stewart, it is also supported by certain extrinsic facts, such as the damage to costly tubes caused by overpower operation and the fact that the station's antenna was often operating at less than full power because of problems to the antenna's design.

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**Federal Communications Commission**

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KOKS(FM), Poplar Bluff, Missouri	)	

TO: The Review Board

**REPLY BRIEF**

Calvary Educational Broadcasting Network, Inc. (Calvary), by its undersigned attorney and pursuant to section 1.277(c) of the Commission's Rules and Regulations, 47 C.F.R. § 1.277(c) (1993), hereby submits this Reply Brief to "The Mass Media Bureau's Exceptions to Initial Decision" (hereinafter "Exceptions") filed by the Mass Media Bureau on August 16, 1993. In support of its Reply Brief, Calvary shows and states as follows.

**I. INTRODUCTION**

1. The Mass Media Bureau's Exceptions to the Initial Decision of Chief Administrative Law Judge Joseph Stirmer, FCC 93D-15 (released July 16, 1993) (Hereinafter cited as "ID ¶ \_\_\_\_") have a common thread, they attack the findings and conclusions of the Judge below which are based, in many instances, on the Judge's evaluation of the demeanor and credibility of the witnesses which testified in an almost week long field hearing. Long-standing precedent, recently reaffirmed, accords the Presiding Officer's demeanor findings great weight. As the Commission observed in

(released June 23, 1993):

In the instant case the ALJ had ample opportunity to observe witnesses himself ... As we have repeatedly held, his credibility findings are accorded great weight and should not be reversed unless they are patently in conflict with the record evidence.

In affirming the findings of Chief Administrative Law Judge Stirmer in Naguabo Broadcasting Co., 6 FCC Rcd 912, 919, 68 Rad. Reg. 2d (P&F) 1325, 1336-37 (Rev. Bd. 1991), rev. denied, 6 FCC Rcd 4879, 69 Rad. Reg. 2d (P&F) 1188, the Review Board expounded on the deference required of the Presiding Officer's credibility findings, and noted that:

[t]hough the Board recognizes its responsibility to look behind credibility findings to assure substantial record evidence in support ... and will reverse in the absence of such solid record support, it has encountered such situations only "[o]n rare occasions." Richardson B/cast Group, 5 FCC Rcd 5285, 5287 (Rev. Bd. 1990).

See also, Broadcast Associates of Colorado, 104 F.C.C.2d 1619 (1986); Signal Ministries, Inc., 104 F.C.C.2d 1481, 1486, 60 Rad. Reg. 2d (P&F) 1700 (Rev. Bd. 1986); TeleSTAR, Inc., 2 FCC Rcd 5, 12-13, 61 Rad. Reg. 2d (P&F) 1418 (Rev. Bd. 1987) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951)).

2. The case for the Commission's traditional deference to a Presiding Officer's credibility findings is certainly reinforced in this proceeding. The Chief Administrative Law Judge presided over a hearing of almost a week in which the testimony of over 15 witnesses was heard. The KOKS renewal case arose out of a bitter and long continued local controversy featuring petition drives,



multiple filings with the Commission, and a civil lawsuit.<sup>1/</sup> Much of the testimony concerned events that occurred almost four years previously, and, in many instances, was in direct conflict. The experience and acumen of the Chief Administrative Law Judge in evaluating the mass of conflicting and emotional testimony has not often been put to a sterner test. The Commission has traditionally relied on the Presiding Officer's credibility findings, and this case is an example of why that reliance is fully merited.

## II. ARGUMENT

### A. Assertions that Calvary Should Be Denied Renewal for Violations of the Blanketing Rule Overlooks the Mitigating Evidence in the Record.

3. The Mass Media Bureau's Exceptions argue that the Presiding Officer erred in not disqualifying Calvary for its purported repeated violations of the Commission's blanketing rules. In making its arguments, however, the Mass Media Bureau ignores the mountain of record evidence properly credited and considered by the ALJ which mitigated and/or explained Calvary's violations of the Commission's blanketing rules. These factors included the fact that: Calvary was working in an extraordinarily difficult technical environment because of the weakness of the television signals which the complainants wish to receive,<sup>2/</sup> including the fact that

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<sup>1/</sup> The local interest in the hearing was so intense that a local television station wished to televise the hearing live. This request was denied by the ALJ on the first day of the hearing.

<sup>2/</sup> Not only is the record replete with evidence suggesting that curing blanketing interference is more difficult to observe as well as to cure if the signals which the complainants wish to receive are already weak, the record also shows that Calvary is the  
(continued...)

installation filters and other remedial measures reduced the signal strength of desired stations which were weak to begin with (ID ¶¶ 68, 106); Calvary's principals were neophyte broadcasters who received poor advice concerning how to cure the problem (ID ¶¶ 101, 103); and, the number of complaints which swamped Calvary's ability to respond (ID ¶¶ 26, 27, n.21). Most importantly, however, Calvary's response to the blanketing complaints was fatally compromised by its belief that it had no legal duty to cure interference to the signal of channel 6, WSPD, Paducah, Kentucky, which was the chief complaint (ID ¶ 21). The record shows that this belief was reasonable, in view of the fact that Calvary principals were advised of this fact by both its consulting engineer and its communications counsel (ID ¶ 108). Moreover, from the very first response Calvary filed with the Commission, and in every response it filed with the Commission, it made reference to its belief that Calvary was not responsible for curing interference to channel 6 reception. The Commission did not choose to disabuse Calvary of this belief until the Hearing Designation Order (HDO), published roughly three and one-half years after the first Commission correspondence to the licensee concerning this matter (ID ¶ 108).

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<sup>2</sup>/(...continued)  
first noncommercial FM station to be held responsible for the protection of the signal of a television channel 6 station outside the television station's grade B contour (ID ¶ 86). Under normal circumstances, a noncommercial FM station is not responsible for curing interference to the television station's signal outside the grade B contour of the channel 6 television station. See, §73.525 (c) of the Commission's Rules and Regulations.

4. If Calvary did not wholly comply with the Commission's FM blanketing rules at least part of the reason was the fact that the Commission did not tell Calvary, despite repeated opportunities to do so, the rules with which Calvary was responsible for complying. Unfortunately, the HDO was the most comprehensive guidance ever given Calvary concerning its obligations under the FM blanketing rules. Contrary to the Mass Media Bureau's Exceptions, Calvary's performance can only be fairly evaluated following the short term renewal provided in the ID when Calvary's obligations to the complainants, and the complainants obligations to Calvary, are fairly spelled out.

**B. The Presiding Officer Properly Found That Calvary Made No Misrepresentations to the Commission.**

5. The Commission argues that Calvary made misrepresentations in reporting the complaints of Mary Wynn, Joanne Gray, and Sandra Durbin cured when they were not. As the Presiding Officer properly concluded (See ID ¶ 112), Calvary did not report to the Commission that it satisfied the complaints of these individuals. To the contrary, in Mrs. Wynn's case Calvary specifically reported that she was not satisfied with the results of two different home visits (ID ¶ 36). With respect to Mrs. Durbin and Mrs. Gray, Calvary reported that the installation of filters improved or cured blanketing interference to channels other than channel 6 (Durbin: ID ¶ 36; Gray: Calvary Finding of Fact and Conclusions of Law, ¶ 21, Calvary Ex. 21, p. 12). In none of these cases did Calvary report the complaint cured or the complainant satisfied, particularly with respect to the reception of channel 6 (ID ¶ 112).

6. The Mass Media Bureau excoriates Calvary because of the fact that Calvary knew that these persons were dissatisfied with its efforts to cure blanketing interference, and didn't correct its previously filed reports to the Commission. However, Calvary believed that the gravamen of the complaints had to do with the reception of channel 6, which it had reported to the Commission it had not restored in each instance, and which it reasonably believed it was not responsible for curing. The fact that none of these complainants was identified as a complainant whose complaint needed to be cured in the Commission's October 30, 1990 letter to Calvary, when Calvary had clearly and unambiguously stated that it had not cured the purported interference to channel 6, could only be interpreted by Calvary as further confirmation of its belief that it owed no further duty to those who complained of interference to channel 6.

7. Moreover, while the Mass Media Bureau also argues that Calvary was lacking in candor for not submitting corrections to its earlier reports after subsequent complaints by these individuals were filed, it is, at least, questionable whether Calvary had such a duty. No where is there a clear or irrefutable duty demanding that a licensee correct an earlier filed report when the complainant sends a subsequent complaint to the Commission. Calvary can hardly be hiding anything when the Commission sends Calvary a copy of an additional complaint concerning its efforts to comply with the blanketing rules! Moreover, particularly in this case, the Mass Media Bureau would seemingly add this redundant

purported obligation to a licensee already buried in complaints, petitions and home visits to the point where the licensee's ability to respond is compromised.<sup>3/</sup>

8. The Mass Media Bureau also accuses Calvary of misrepresentation in claiming in its reports that the interference problems of Mrs. Durbin, Gray and Wynn were cured when they were not. The Bureau's argument is based on a false premise, however. In each instance Calvary reported that the problem was "resolved" or "cured" with respect to the purported interference on channels other than channel 6. Moreover, there is plenty of room for good faith disagreement concerning whether the reception of a channel is "improved" or "cured," particularly when the complainants are comparing the signal to what it might have been many years before, and Calvary was basically determining if the signal is improved compared to what it was a few minutes before. As the Presiding Officer properly recognized, determining if a problem is "resolved" in many instances is a matter of judgment based on individual perceptions (ID ¶ 115). Calvary provided voluminous material concerning its efforts including contemporaneous notes.

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<sup>3/</sup> The Mass Media Bureau also notes that Calvary didn't cure Mrs. Gray's complaint to her radio, which it did not report to the Commission. Exceptions, p. 10. However, the record shows that when Mrs. Stewart visited her home Mrs. Gray complained of interference to the AM band of her radio, and didn't believe that she showed or mentioned any interference to the FM band on her radio to Mrs. Stewart. (ID ¶ 24; Calvary Findings of Fact and Conclusions of Law, ¶ 16). Of course, FM blanketing interference does not effect the AM band of the radio, and Mrs. Stewart reasonably believed that Calvary had no obligation to fix Mrs. Gray's radio.

9. The Presiding Officer also found that Calvary did not misrepresent facts when it reported that Mrs. Smith was not cooperative with Calvary, because the matter of cooperation is an opinion and not a fact, pointing to the record evidence that Mrs. Smith refused to allow a Calvary representative on her roof, had filed a lawsuit requesting money damages, and was organizing a petition campaign against the station (ID ¶ 113). Moreover, Mrs. Smith has previously made comments which led Mr. and Mrs. Stewart to believe that she would not be satisfied until the KOKS tower was dismantled (ID ¶ 23). As the Presiding Officer correctly pointed out, these are not unreasonable grounds for Calvary to conclude that Mrs. Smith was uncooperative. The Mass Media Bureau's Exceptions on this point do not satisfy its burden of proving that the ALJ's conclusions are "patently" contrary to the record evidence.

10. Likewise, the Mass Media Bureau's Exceptions claim that the Presiding Officer should have believed Mr. Hodgins' claim that Calvary failed to keep three appointments, rather than Calvary's version that a convenient time could never be worked out in three different instances. However, on this issue the Presiding Officer's evaluation of the testimony of the witnesses, in this case, Mrs. Stewart, may not be overturned unless it is utterly unsupported by the record. Here, that cannot be the case. As pointed out by the Presiding Officer (ID ¶ 114), Mrs. Stewart made countless home visits, often more than once, and the record is bereft of any other evidence that Mrs. Stewart failed to keep

appointments. It strains credulity to believe that in the midst of visits to between 135 to 150 homes, sometimes more than once, Stewart would single out Mr. Hodgins for a deliberate snub.

11. The Mass Media Bureau's Exceptions also accuse Calvary of misrepresentation in connection with its visits to the Hillis home, because Calvary allegedly reported that it detected no blanketing interference at the Hillis home, yet, according to the Mass Media Bureau, in the same paragraph Mrs. Stewart is alleged to have heard KOKS audio on the Hillis' TV set. Thus, according to the Mass Media Bureau proving that Calvary knew of the blanketing interference to the Hillis' set and making it guilty of misrepresentation. What the Mass Media Bureau ignores in making that accusation, however, is that the two visits to which the Commission refers were separated by roughly 18 months. In addition, in the later report in which it stated that the Hillis' set was not experiencing blanketing interference, Calvary relied on Mr. Lampe's professional opinion. Mr. Lampe concluded that there was no blanketing interference received by the Hillis set because of the lack of the characteristic herringbone pattern on the TV set which is indicative of blanketing interference (Calvary Findings of Fact and Conclusions of Law, ¶¶ 35, 41). Mr. Ramage, who made an inspection of the Hillis home roughly a year later, also did not notice the distinctive herringbone pattern indicative of blanketing interference on the Hillis' set, and noticed only a very slight difference in TV reception when KOKS was on and off the air. Clearly, Calvary was not acting in bad faith in reporting the

conclusions of its TV repair consultant, which were inferentially supported by Mr. Ramage's report.

**C. The Presiding Officer Did Not Err in Not Disqualifying Calvary for An Alleged Lie Concerning Overpower Operation.**

12. The Mass Media Bureau also contends that the Presiding Officer erred in not disqualifying Calvary for Mr. Stewart's alleged lie in contradicting Mr. Meador's testimony that Mr. Stewart ran the transmitter in excess of its authorized power (ID ¶ 91). Because the ID refers to this purported incident as "one instance where Calvary operated outside the parameters specified in its license" (ID ¶ 91), and the Presiding Officer found Mr. Stewart to be an "unpersuasive witness" (ID ¶ 117, n.23), the Mass Media Bureau argues that the Judge erred in not disqualifying Calvary for Mr. Stewart's alleged lie. The Presiding Officer, however, properly used his sound discretion in this matter.

13. In the first instance, an applicant usually cannot be disqualified for a lack of candor or a misrepresentation without the addition of a specific issue. Silver-Star Communications-Albany, Inc., 3 FCC Rcd 6342, 6349-6350, 65 Rad. Reg. 2d (P&F) 761, 771-772 (Rev. Bd. 1988). The exception to this general rule is the instance where the lack of candor or misconduct occurs "before the judge's own eyes, '[but] such conduct should be of such blatant and unacceptable dimension that its existence cannot be denied.'" Richardson Broadcast Group, 5 FCC Rcd 5285, 68 Rad. Reg. 2d (P&F) 75, 76, n.3 (Rev. Bd. 1990), quoting the Brief for the FCC at 45, LBC, Inc. v. FCC, 865 F.2d 1329 (D. C. Cir. 1988). In Silver-Star,



supra, the Review Board held that "any conclusion of lack of candor arrived at without designation of a specific issue be so blatant as to make any further evidentiary hearing on the matter of candor obviously superfluous." Silver-Star Communications-Albany, Inc., supra, 65 Rad. Reg. 2d (P&F) at 771-772. It is clear that Mr. Stewart's testimony does not rise to this "blatant and unacceptable" dimension. In the first instance, it is somewhat unclear what finding the Presiding Officer is making with respect to Mr. Stewart's testimony. The Presiding Officer makes reference to the "one instance" of overpower operation, but later refers to the fact that Mr. Meador "may have operated in excess of authorized power" (ID ¶ 117, n.23) thus softening his seemingly positive finding of overpower operations. The ALJ also notes that Mr. Meador's testimony was refuted by both Mr. and Mrs. Stewart. Clearly the Presiding Officer has not reached a firm conclusion concerning the matter, and made his findings in the context of considering whether a forfeiture for overpower operation was appropriate and determining that it was not. Moreover, there are other intrinsic factors which make it highly unlikely that Mr. Stewart would have operated the transmitter at an overpower situation. Both Mr. Ramage and Mr. Meador testified that it wasn't "smart" to run a transmitter at powers higher than authorized because overpower operation damaged expensive tubes (Calvary Findings of Fact and Conclusions of Law, ¶ 8). Mr. Stewart's worries about costs are a well documented fixture in the record. The record is also replete with evidence that during this time

period Calvary often had to operate at less than full power because of damage to the station's antenna, and arcing and problems caused by the station's antenna running at full power. Clearly it would be incautious, not to say irresponsible, to risk what experience had shown was a fragile and often repaired antenna for the 10 percent extra power at issue here. At any rate, the record simply shows a testimonial conflict on the issue, not unambiguous and convincing evidence proving that Mr. Stewart lied.

**WHEREFORE,** the foregoing considered, Calvary Educational Broadcasting Network, Inc. respectfully urges the Review Board to speedily affirm the Initial Decision of the Honorable Chief Administrative Law Judge Joseph Stirmer in the above-captioned proceeding.

Respectfully Submitted,

**CALVARY EDUCATIONAL BROADCASTING  
NETWORK, INC.**

By: 

Joseph E. Dunne III  
Its Attorney

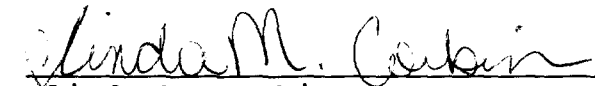
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CERTIFICATE OF SERVICE

I, Glinda Corbin, a paralegal in the offices of May & Dunne, Chartered, hereby certify that I have on this 7th day of September, 1993, caused the foregoing "REPLY BRIEF" to be hand-delivered to the following:

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